U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FA)

NOTICE: This is an electronic bench opinion which has not been verified as official.

Date: 02/10/00
Case No.: **1999 INA 271**

In the Matter of:

RANDY DESHLER dba DESHLER'S SPECIALTIES, Employer,

on behalf of

JACOB CASTRO-MADRID, Alien

Certifying Officer: Hon. R. M. Day, Region IX
Appearance: P. H. Morgan, Jr., Agent, of Pico Rivera, California, for Employer and Alien.

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that RANDY DESHLER dba DESHLER'S SPECIALTIES ("Employer") filed on behalf of JACOB CASTRO-MADRID ("Alien"), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California,, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

the purpose of performing skilled or unskilled labor is ineligible for labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.[2]

STATEMENT OF THE CASE

On October 17, 1995, the Employer applied for alien employment certification on behalf of the Alien to fill the position of "Auto Upholsterer" in his Auto Upholstery business. The position was classified as an "Automobile Upholsterer" under DOT Occupational Code No. 780.381-010.[3] Employer described the Job Duties as follows:

> Repairs or replaces upholstery in automobiles, buses, and trucks, removes old upholstery from seats and door panels of vehicle. Measures new padding and covering materials, and cuts them to required dimensions, using knife or shears. Adjusts or replaces seat strings and ties them in place. Sews covering material together using sewing machine. Fits covering to seat frame and secures it with glue and tacks. Repairs or replaces convertible tops. Refurbishes interiors of street cars and buses by replacing cushions, drapes, and floor coverings. Also upholsters interior of limousine and hearse bodies, selects and cuts material to specifications, using shears & pattern. Sews material together, using sewing machine. Installs padding, and fastens and sews covering material in place in body of vehicle. Fits and installs automobile seat covers and convertible-tops.

AF 48, box 13. This was a forty hour a week job from 6:00 AM to 3:00 PM, at an hourly wage of $14.29, with time and a half for overtime work. The Employer stated no educational or training requirement, but required two years of experience in the Job Offered. As Other Special Requirements the Employer said, "Written verifiable references required." *Id.*, boxes 10 -12. The Employer's recruitment report noted one applicant for this position, he was not hired for the Job

---

[2]Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[3]780.381-010 **AUTOMOBILE UPHOLSTERER** (automotive ser.) Repairs or replaces upholstery in automobiles, buses, and trucks: Removes old upholstery from seats and door panels of vehicle. Measures new padding and covering materials, and cuts them to required dimensions, using knife or shears. Adjusts or replaces seat springs and ties them in place. Sews covering material together, using sewing machine. Fits covering to seat frame and secures it with glue and tacks. Repairs or replaces convertible tops. Refurbishes interiors of streetcars and buses by replacing cushions, drapes, and floor coverings. May be designated according to specialty as Body Trimmer (automotive ser.); Bus Upholsterer (automotive ser.); Top Installer (automotive ser.). *GOE: 05.05.15 STRENGTH: M GED: R3 M2 L3 SVP: 6 DLU: 77*

Offered. AF 60, 64A-66.[4]

Notice of Findings. On January 14, 1999, the Certifying Officer ("CO") issued a Notice of Findings ("NOF"), proposing to deny certification. AF 44-46. The NOF cited 20 CFR §§ 656.21(b)(6) and 656.21(j)(1)(iii) and (iv) in finding that an apparently qualified U. S. worker was rejected for reasons that were neither lawful nor job-related, observing that Mr. Guiao's resume indicated many years of work experience as an automobile upholsterer, and that he had worked as an automobile upholsterer in the United States for four years. AF 64A-65. The NOF said Employer's recruitment report represented that Mr. Guiao was contacted and requested to produce specific documentation of his qualifications and citizenship status in the United States, a third party called and advised that the worker had secured other employment. The NOF noted that Employer's statement was uncorroborated by any evidence of record, and that the U. S. worker was "very well qualified for the job opportunity." The NOF then told the Employer to take the following corrective action:

> The employer must explain, with specificity, the lawful job-related reasons for rejecting each U. S. worker referred, and give the job title of the person who considered him for employment. The employer is requested to forward evidence of contact with Mr. Guiao and explain with specificity the reasons, if Mr. Guiao is found to be not qualified, able, available, or willing to accept the job offer. Inability on the part of the employer to contact Mr Guiao presently will not be viewed as a lawful reason for rejection of this applicant.

AF 45.

Rebuttal. On January 27, 1999, the Employer submitted a rebuttal that consisted of a letter from the Employer, Mr. Guiao's application and resume, and various documents already in the record. Mr. Deshler said that he interviewed Mr. Guiao on April 29, 1996, that Mr. Guiao "demonstrated a lack of knowledge of fabrics and installation techniques," that part of his experience in the Untied States "was limited to the installation of vinyl materials and not with the kind of fabrics being used at Deshler's Specialties." Assuming the level of experience stated by Mr. Guiao's resume, "[T]he applicant does not have the minimum experience working with the fabrics and installation techniques used by my company." In addition, the Employer said he had received a telephone call from a person representing herself to be the wife of Mr. Guano, who said he no longer was interested in the Job Offered. AF 26.

---

[4] A national of Mexico, the Alien was born 1969 and attended a preparatory school in Mexico from 1985 to 1986. From April 1993 to May 1995, the Alien worked as an Auto Upholsterer in California, where his work was the same as the Job Offered. From June 1995 to October 1995, the Alien said he was self-employed as an auto upholsterer, repairing and replacing upholstery in automobiles at the owner's place of residence. He was living and working in the United States with no visa or other lawful permission at the time the Application was filed. AF 84. In view of the findings in this decision, we note the issue, but do not need to decide whether the Alien's current illegal status and employment by Employer precludes a grant of labor certification pursuant to 20 CFR § 656.20(c)(7).

Final Determination. The CO issued a Final Determination denying certification on March 9, 1999. AF 24-25. Again citing 20 CFR §§ 656.21(b)(6) and 656.21(j)(1)(iii) and (iv), the CO denied alien labor certification for the reasons that follow. After reviewing the Application, the NOF, and the rebuttal, the CO noted the nature of the Job Offered and Mr. Guano qualifying work experience and said,

> The employer has rejected Mr. Guiao merely based on the finding that his experience at the previous employer is inappropriate for the job offered. For the employer to state that this applicant "does not have the minimum experience working with the fabrics and installation used by my company," implies that there is no job opening for a U. S. worker.
>
> The employer has not clarified how the fabrics and installation techniques used by his company are different or unique from those used elsewhere in the industry. But to reject an apparently qualified job applicant for not possessing the minimum experience working with the fabrics and installation techniques used by the employer is an unlawful rejection.

The CO denied certification on grounds that the Employer failed to establish that the U. S. job applicant did not meet the minimum job requirements, and that the U. S. worker was not qualified, available, able and willing to fill the job vacancy. AF 25.

Appeal. On April 1, 1999, the Employer requested administrative judicial review of the denial of certification, contending that the U. S. worker was not qualified for the Job Offered and that he was not available at the time of application. The Employer's appeal included added statements of fact that he desired BALCA to consider in this appeal. It is well settled that evidence first submitted with the request for review will not be considered by the Board. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992); **The Fifteenth Street Garage**, 90 INA 052 (Nov. 21, 1990); **Physicians Inc.**, 87 INA 716 (Jul. 12, 1988). Because the newly proffered evidence was not considered by the CO, the Employer's new assertions of fact in the statement of his reasons for appeal were not part of the record on which the CO denied certification. 20 CFR §§ 656.26(b)(4) and 656.27(c). Therefore, the Employer's allegations of evidence in the statement of the reasons for his appeal will not be considered.

DISCUSSION

Burden of proof. In addressing the issues cited in Employer's appeal, the Panel first observes that certification is a privilege that the Act expressly confers as favored treatment granted to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of this grant of a statutory privilege is indicated in 20 CFR § 656.2(b). Because the Employer applied for alien labor certification under this exception to the Act, the Panel's deliberations concerning the CO's denial of certification address a request for an exemption from the Act's general operation, which must be strictly

construed.[5] Consequently, any doubt must be resolved against the party asserting this exemption. See 73 Am Jured § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 Sat 1071, 1073, 41 LEd 242 (1896). For the reasons hereinafter discussed, the Employer failed to sustain his burden of proof.

Unspecified requirements. Employer's evidence concerning the issues cited in the NOF and the Final Determination was limited to the statement by its owner, who concluded that Mr. Guiao was unqualified because he "demonstrated a lack of knowledge of fabrics and installation techniques," and because his experience in the Untied States "was limited to the installation of vinyl materials and not with the kind of fabrics being used at Deshler's Specialties." The Emplyer concluded that Mr. Guano did not have the minimum experience working with the fabrics and installation techniques used by the Employer.

For the purpose of applying the Act and regualtions to this application, experience in the job offered means experience performing the listed job duties. **Integrated Software Systems, Inc.,** 88 INA 200 (July 6, 1988). While an employer may contemplate that certain duties specified in its job description may require specific education and/or experience, such requirements must be identified by the employer's recruiting advertisement and must be part of the description of the job to be performed that the Employer stated in ETA Form 750A of the Application. **J. W. Manny, Inc.**, *id.*,; **Eldorado Coffee Dist., Ltd.**, 93 INA 460 (Jul. 26, 1994). The job duties listed in Employer's Application and recruiting advertisement gave no indication that work experience with the particular fabrics and installation techniques that his automobile upholstering shop used would be a hiring criterion for this job. AF 48, 67. The broad range of experience, education, and training apparent in Mr. Guiao's resume raised the reasonable possibility that he was qualified, but for hiring criteria that the Employer did not disclose until the job interview. **Ceylion Shipping, Inc.**, 92 INA 322(Aug. 30, 1993); **Executive Protective Services, Inc.,** 92 INA 392 (July 30, 1993); **Messina Music, Inc.**, 92 INA 357 (July 20, 1993). It is well established that an employer may not reject a U. S. worker based on an unstated job requirement. **33 East Maintenance Corp./Freehold Cartage Corp.**, 94 INA 242 (Jun. 27, 1995); **Blue Ridge Farms**, 94 INA 106 (Mar. 22, 1995); **CCD Online System, Inc.**, 93 INA 151 (May 4, 1994). As the rejection of U. S. workers for not meeting unspecified requirements constitutes the unlawful rejection of qualified U. S. workers pursuant to 20 CFR § 656.21(b)(7), Employer's application of such criteria in the rejection of Mr. Guaio was contrary to law. **J. W.**

---

[5] 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants, says, "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act clearly shows that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, t Cong., 1st Sass., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

Manny, Inc., 96 INA 416 (Jun. 10, 1998); **Photo Network**, 89 INA 168 (Feb. 7, 1990).[6] It follows that the Employer's previously undisclosed requirement of experience with particular fabrics and installation techniques that his shop used violated 20 CFR §§ 656.20(c)(8), which required the Employer to establish that the position offered has been and is clearly open to any qualified U. S. worker.

Moreover, it is well-established that an applicant usually will be considered qualified for a job if he meets the minimum requirements specified for the job in the labor certification application. **United Parcel Service**, 90 INA 090 (Mar. 28, 1991); **Mancillas International Ltd.**, 88 INA 321 (Feb. 7, 1990); **Microbilt Corp.**, 87 INA 635 (Jan. 12, 1988). Employer's rejection of Mr. Guano was unlawful for the further reason that he satisfied the minimum requirements specified on the ETA 750A and in the advertisement for the position. **American Cafe**, 90 INA 026 (Jan. 24, 1991); **Cal-Tex Management Services**, 88 INA 492 (Sept. 19, 1990); **Richco Management**, 88 INA 509 (Nov. 21, 1989). Mr. Guano was considered qualified for a job if he meets the minimum requirements specified for the job in the labor certification application, notwithstanding the undisclosed hiring criteria Employer applied in rejecting him. On the other hand, Employer's application indicated he was willing to hire the Alien without specific qualifications that it clearly considered to be material, however, even though the record gave no indication that the Alien offered the skills that Employer required and the record contained no evidence of the Alien's written verifiable references. Moreover, the Alien's education and work experience included no reference to a background in either the use of "the kind of fabrics being used at Deshler's Specialties" or working with the installation techniques Employer said he used in his shop. AF 85. Aside from the bare representations in the Alien's Statement of Qualifications, the record contains no evidence corroborating his claim that he worked for two years as an automobile upholsterer in California, however. As he did not have a visa permitting him to live and work in the United States during the period when he claims he acquired the experience, there is no basis on which to assume that he was, in fact, working in California at that time in the absence of written verifiable references corroborating such employment. The Employer's Application proposed to hire him without the "written verifiable references" that his recruiting advertisement and Application required of the U. S. workers who applied for this position. It follows that neither of these hiring standards could be applied to Mr. Guiano because the Alien clearly did not meet those qualifications. 20 CFR § 656.21(b)(5) requires the Employer to establish that its requirements for the job opportunity represent its actual minimum requirements for the Job Offered, that it has not hired workers with less training or experience for jobs similar to the position offered, and that it is not feasible to

---

[6] For further cases holding that an employer generally may not reject a U. S. worker based on an undisclosed job requirement, see **United Const. Weather Proofing Co.**, 92 INA 172 (Mar. 26, 1993) (Scaffolding work not listed in application or advertisements.); **United Calibration Corp.** 91 INA 075 (Mar. 24, 1993) (Employer improperly rejected U. S. worker for failure to have taken specific courses where the employer only stated that it required an academic degree.); **Armando's Italian Restaurant,** 92 INA 051 (Mar 23,. 1993) (Experience in preparing Italian dishes not listed for the position of lead waiter); **M. K. Catering Consultants, Inc.,** 92 INA 010 (Jan. 29, 1993); (Rejection unlawful where requirement that experience specifically be with Indian cuisine not stated.); **Lorenzana Foods Corp.**, 91 INA 020 (Jan. 26, 1993); **L. M. C. Corp.,** 91 INA 034 (Jan. 26, 1993); **Travers Associates, Inc.**, 91 INA 115 (Jan. 6, 1993); **Electronic Development Corp.,** 91 INA 324 (Dec. 16, 1992)..

hire workers with less training or experience that its job offer requires. Where the alien does not meet employer's stated job requirements, the employer's job requirements may be found not to be his actual minimum requirement.. **Super Seal Manufacturing Co.**, 88 INA 417 (Apr. 12, 1989)(*en banc*). Based on the evidence discussed above, it is concluded that this Employer required more stringent qualifications of Mr. Guano than it required of the Alien, whom it proposed to hire even though he did not meet have the hiring qualifications it applied in rejecting Mr. Guano. **ERF, Inc., dba Bayside Motor Inn**, 89 INA 105 (Feb. 14, 1990). It follows that the Employer failed to sustain his burden of proving that the position he offered was clearly open to any qualified U. S. worker under 20 CFR § 656.20(c)(8).

Finally, the Board has repeatedly held that an employer's bare assertion that a U. S. applicant is not interested in a job is insufficient to prove rejection for a lawful, job-related reason. **A.V. Restaurant**, 88 INA 330 (Nov. 22, 1988). The Employer's unsupported and undocumented assertions are insufficient to establish that he offered the job to U. S. worker at the time of the interview. **Carl Joecks, Inc.**, 90 INA 406(Jan. 16, 1992). Where, as in this case, the facts are not capable of proof by independent documentation and are provable only by the testimony or statements of the persons involved, the weight of the statement in the Employer's recruitment report depends largely on the credibility of the person making the statement. The speaker in this case is the Employer, himself, who represented that he conducted the interview with Mr. Guano and described the events Employer said took place during and after that interview. The credibility of the Employer's assertions of fact and the hearsay statements he related depends on the surrounding facts and circumstances, the source of the knowledge of the speaker, the interest of the speaker, the good or bad intentions of the speaker, the manner of the testimony by the speaker, and other indices of the speaker's honesty or credibility. **Mr. and Mrs. Jeffrey Hines**, 88 INA 510 (Apr. 9, 1990). As the Employer did not offer evidence that met any of the criteria described in **Hines**, we conclude that the record was sufficient to support the CO's finding that the Employer failed to establish that the Job Offered was clearly open to any qualified U. S. worker. 20 CFR § 656.20(c)(8).

Because the CO's findings on the evidence of record clearly supported the denial of certification, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

_____

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: 1999 INA 271
RANDY DESHLER dba DESHLER'S SPECIALTIES, Employer,
JACOB CASTRO-MADRID, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner

Date: September 28, 1999